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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

KAMRAN GHIASSI, et al.,

Plaintiffs and Respondents,

v.

MEHDI BAGHERI,

Defendant and Appellant.

H042939

(Santa Clara County

Super. Ct. No. 2015-1-CV-278059)

Plaintiffs and Respondents Kamran Ghiassi and Sanam Jirbandei contracted with musician Defendant and Appellant Mehdi Bagheri (Bagheri) to perform at their school, Razi Farsi School and Art Academy (Razi). After a series of events, Plaintiffs sued Bagheri for breach of contract, breach of covenant of good faith and fair dealing, fraud and intentional misrepresentation, and unjust enrichment, as well as for two counts of defamation (slander and libel). Bagheri responded by “making a motion under a California statute designed to hasten resolution of certain disputes commonly characterized as strategic lawsuits against public participation (SLAPP)—lawsuits meant to chill the valid exercise of the public’s rights to free speech and petition for redress of grievances. (Code Civ. Proc.^[1], § 425.16, subd. (a) [fn. omitted]; [citation].) Known as the anti-SLAPP statute, this law permits a defendant facing such a lawsuit to dispose of it through a special motion to strike one or more causes of action.” (*Rand Resources, LLC*

¹ All undesignated statutory references are to the Code of Civil Procedure.

v. City of Carson (2019) 6 Cal.5th 610, 615 (*Rand*).) On appeal from the trial court’s order denying Bagheri’s motion, we consider whether the causes of action raised in Plaintiffs’ complaint “arise—as required to advance a valid anti-SLAPP motion—from [Bagheri’s] acts in furtherance of [his] right of free speech in connection with a public issue.” (*Ibid.*) We find they did not and affirm the trial court’s order.

I. FACTUAL AND PROCEDURAL BACKGROUND

In January 2015, Ghiassi entered into a written contract with Bagheri, on behalf of Razi, for Bagheri to perform at a fundraiser at the school in March 2015. The contract required Bagheri to give 45 days’ notice of any change in the performance schedule or cancellation; if he canceled, Bagheri had to refund any money Razi paid to him or on his behalf, including expenses and “accrued penalties.” If Razi canceled, Razi had to pay Bagheri \$700.

Just over a week after signing the contract, Plaintiffs allege Bagheri contacted Jirbandei by telephone; Jirbandei took the call in her car over Bluetooth, such that the passengers in the car could hear the conversation. Bagheri indicated he would not publicize the event on his social media, despite allegedly agreeing to do so. He called Jirbandei “a ‘lowlife’ and ‘vulgar’ person,” stating “he had been ‘warned’ by other people not to engage in any kind of business relationship with Plaintiffs.” Ghiassi e-mailed Bagheri several days later, asking Bagheri not to engage in such talk about Plaintiffs and Razi, and indicating his desire for the parties to continue their contract. In reply, Bagheri repeated his “insulting language,” allegedly calling Jirbandei a “lowlife” and “vulgar” person. However, he also indicated he hoped there could still be a successful performance. Bagheri sent the e-mail to a business e-mail address accessible by all employees, teachers, and volunteers at Razi.

In response to this e-mail, Ghiassi indicated Razi wanted to void the contract “at no financial damage to either party,” based on Bagheri’s insults, and Ghiassi’s belief that the parties could not work together. When Bagheri indicated he was “ready, willing, and

able to perform,” and intended to “proceed with [his] obligations under the contract,” Ghiassi stated the performance could continue if Bagheri apologized to Jirbandei. Alternatively, Ghiassi again offered to cancel the contract with no penalty to either party. Bagheri restated his willingness to proceed with the performance and honor the terms of the agreement.

After Ghiassi sent an e-mail suggesting the project would not be successful due to lack of proper communication, Bagheri sent the following e-mail to the Razi business e-mail address on February 4, 2015 (the February 4 e-mail): “Reluctantly and against my better judgment I am going to respond to your last email. The mistake to enter to [*sic*] a contract was not yours , [*sic*] it was mine in a big time. It is not the money, the purpose is to teach you and people like you who are law breakers, dishonest and are total crooks a lesson. I spend more money for my dogs [*sic*] visits to the veterinarians than the money in question. One can easily judge who is a real *chaleh-meydoni*, by reading your emails and my responses. Due to the fact that you have not complied with our contract and did not deposit your first installment and ultimately canceled the contract, I demand that you immediately pay the penalty as per the contract. You must pay this fund but [*sic*] Feb. 9th, 2015. If I didn’t receive you [*sic*] full payment by then, my next contact with you will only be through the court of law. You don’t deserve personal communications.” (Italics added.)

Jirbandei responded to Bagheri’s February 4 e-mail, stating Plaintiffs would agree to proceed with the performance and “put everything behind [them]” if Bagheri apologized. Absent an apology, she indicated Plaintiffs would file a civil lawsuit. Several days later, Bagheri e-mailed Razi confirming receipt of the retainer payment and indicating his intent to “move forward with the performance in accordance with [the parties’] contract.”

The record on appeal does not reflect any further communications between the parties during February 2015. On March 2, 2015, an attorney wrote to Plaintiffs on

Bagheri's behalf, alleging Plaintiffs "breached multiple legal obligations to [Bagheri]." The letter set forth legal authority in support of Bagheri's claims. It stated Bagheri's intent to seek "all available legal relief" against Plaintiffs, and reserved Bagheri's right to "proceed with a court action." In response, Plaintiffs' attorney e-mailed Bagheri's counsel, indicating Plaintiffs retained him "in reference to the dispute and claims enumerated in [counsel's] correspondence of March 2, 2015," and that Plaintiffs did not want Bagheri to contact them "in any manner." On March 12, Bagheri's attorney stated he would have Bagheri return the retainer "as [the attorneys] work to resolve the outstanding dispute."

Plaintiffs filed the Complaint for Damages against Bagheri on March 13, 2015, alleging causes of action for breach of contract, breach of covenant of good faith and fair dealing, fraud and intentional misrepresentation, unjust enrichment, slander and libel. They alleged Bagheri breached his contract on February 4, 2015, "when he indicated to Plaintiffs that he did not wish to proceed with the contract and stated that he did not want to communicate with Plaintiffs." Plaintiffs also claimed Bagheri began reaching out to musicians and members of the Iranian-American community, "alleging that no one should do business with Plaintiffs because they are 'crooks,' 'law breakers,' and 'villains.' " They alleged Bagheri posted several comments on social media websites repeating the same accusations and allegations against Plaintiffs. In addition to claiming Bagheri breached the contract, Plaintiffs alleged he "unfairly interfered with [their] right to receive the benefits of the contract by refusing to communicate with Plaintiffs and indicating that he would not perform his obligations under the contract." Plaintiffs alleged Bagheri misrepresented material facts by promising to fulfill his contractual obligations with no intention of doing so. They claimed Bagheri kept the payment Plaintiffs made to him under the contract.

Bagheri filed his special motion to strike under the anti-SLAPP statute in May 2015, alleging Plaintiffs' claims "arise from and impinge on [Bagheri's] rights of petition

and free speech under the United States and California Constitutions” Bagheri argued that all of Plaintiffs’ causes of action arose from the February 4 e-mail, which he described as a “pre-litigation demand email” protected under the anti-SLAPP statute. He noted that Plaintiffs’ defamation claims alleged Bagheri “published written statements accusing Plaintiffs of ‘unethical and illegal business conducts’ [*sic*] but fail[ed] to identify or attach a single document in which Plaintiff [*sic*] made the claimed accusation.”

Bagheri alleged that any statements “published in social media or internet posting are public statement [*sic*] entitled to the protection of the anti-SLAPP statute.” He further claimed Plaintiffs would not be able to establish a probability of prevailing on their claims, as the pre-litigation demand e-mail was “absolutely protected under the litigation privilege,” and their claims otherwise failed as a matter of law. Bagheri declared that he wrote the February 4 e-mail, “anticipating that [his] dispute with [Plaintiffs] may end up in court,” as Plaintiffs had tried to cancel the contract and failed to pay the retainer due to Bagheri, and because Ghiassi had “threatened litigation in his prior emails, indicating that he had lined up three witnesses to testify against [Bagheri].” Bagheri further confirmed that he later received the retainer and, “[t]o avoid a lawsuit, [he] was still willing to proceed with the musical performance.” He notified Plaintiffs of his willingness to proceed in an e-mail sent February 8, 2015. Bagheri claimed Ghiassi thereafter contacted the musicians who would be performing with Bagheri, prompting Bagheri to seek assistance of legal counsel. Once Plaintiffs’ attorney asked that Bagheri no longer contact Plaintiffs, Bagheri returned to them the check he received from Razi.

In response to the motion to strike, Plaintiffs argued Bagheri’s acts were not in furtherance of his rights of petition or free speech under the anti-SLAPP statute. They alleged Bagheri’s conduct was illegal as a matter of law, such that he was precluded from seeking protection under the anti-SLAPP statute. Even if the conduct was not illegal, Plaintiffs argued, Bagheri failed to show that the conduct involved a matter of public

interest. To the extent the court believed Bagheri could show that the conduct fell within the protection of the anti-SLAPP statute, Plaintiffs contended they could demonstrate a probability of prevailing on their claims; they provided declarations from several witnesses, in addition to their own declarations.

The trial court denied Bagheri's motion, finding his February 4 e-mail did not constitute a prelitigation demand letter under section 425.16, subdivision (e)(1), because Bagheri did not demonstrate the letter related to litigation that was under serious consideration. The court also found the conduct alleged in Plaintiffs' first four causes of action did not arise from the February 4 e-mail. As for the defamation claims, the trial court determined Bagheri failed to meet his burden to show that any of the allegedly defamatory statements concerned an issue of public interest.

Bagheri timely noticed his appeal of the order after being served notice of entry of the order by Plaintiffs.² (Cal. Rules of Court, rule 8.104(1)(B).)

II. DISCUSSION

A. The Anti-SLAPP Statute

"The victim of abusive litigation designed to chill the exercise of rights under the First Amendment to the United States Constitution can bring a special motion to strike the so-called SLAPP pursuant to section 425.16 of the Code of Civil Procedure." (*Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176, 1185 (*Nam*).) Such motions to strike serve to prevent and deter lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech, seeking to screen out meritless claims early, before the defendant's resources are drained. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312 (*Flatley*).) Under the anti-SLAPP statute, "(1) A cause of action against a person arising from any act of [the moving party] in furtherance of the person's right of petition or free speech under the United States Constitution or the California

² Section 425.16, subdivision (i) authorizes a direct appeal of the denial of a motion to strike under section 904.1.

Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. [¶] (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(1), (2).)

Appellate review of the trial court’s denial of a motion to strike under section 425.16 requires us to first resolve the threshold inquiry whether defendant made a prima facie showing that the cause of action “arise[s] from” protected activity. (*Nam, supra*, 1 Cal.App.5th at p. 1185.) “A defendant satisfies the first step of the analysis by demonstrating that the ‘conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) [of section 425.16]’ [citation], and that the plaintiff’s claims in fact *arise* from that conduct [citation]. The four categories in subdivision (e) describe conduct ‘in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.’ (§ 425.16, subd. (e).)” (*Rand, supra*, 6 Cal.5th at p. 620.) If the court determines that the defendant has made the showing, the plaintiff is required to demonstrate a probability that the plaintiff will prevail on the claim. (§ 425.16, subd. (b)(1); *Rand*, at p. 620; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 863.)

“We review the trial court’s ruling de novo. ([*Flatley, supra*, 39 Cal.4th at p. 325].) ‘ “We consider ‘the pleadings, and supporting and opposing affidavits upon which the liability or defense is based.’ (§ 425.16, subd. (b)(2).) However, we neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ [Citation.]” [Citation.]’ ([*Flatley*, at p. 326].)” (*Blue v. Office of Inspector General* (2018) 23 Cal.App.5th 138, 150, review den. (Aug. 22, 2018) (*Blue*).) Reviewing the parties’ contentions de novo, we conclude Bagheri did not meet his burden to show that

the conduct by which Plaintiffs claim to have been injured falls within one of the four categories described by section 425.16, subdivision (e).

B. The Conduct at Issue in Bagheri's Motion was not Illegal as a Matter of Law

We begin by addressing Plaintiffs' contention that Bagheri is not entitled to protection under section 425.16 because the acts alleged in the complaint were illegal. Citing *Flatley, supra*, 39 Cal.4th at p. 320, and *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367 (*Paul for Council*), Plaintiffs argue Bagheri engaged in conduct that was illegal as a matter of law, claiming he "fraudulently induce[d] Plaintiffs to enter into a contract based on misrepresentations..." such that he is not entitled to the protections afforded by section 425.16. In *Flatley*, the Supreme Court concluded "that where a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Flatley*, at p. 320.) The communications at issue in *Flatley* constituted criminal extortion as a matter of law; thus, the Supreme Court determined that the activity forming the basis of the defendant's motion to strike was not constitutionally protected activity under section 425.16. (*Id.* at pp. 330, 333; *Paul for Council*, at pp. 1366-1367, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53 [illegal campaign finance activities, as conceded by defendants, did not qualify for protection under section 425.16].) The courts in both *Flatley* and *Paul for Council* noted it was a "narrow circumstance in which a defendant's assertedly protected activity could be found to be illegal as a matter of law and therefore not within the purview of section 425.16." (*Flatley*, at p. 315, citing *Paul for Council*, at p. 1367.) "If . . . a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step

[of the analysis under section 425.16] but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Flatley*, at p. 316.)

Although the defendants in *Flatley* attempted to characterize the subject activity as "permissible settlement negotiations . . . attendant upon any legal dispute," the Supreme Court found, "At the core of [defendant's] letter [were] threats to publicly accuse [plaintiff, a well-known entertainer] of rape and to report and publicly accuse him of other unspecified violations of various laws unless he 'settled' by paying a sum of money In his followup phone calls, [defendant] named the price of his and [codefendant's] silence as 'seven figures' or, at minimum, \$ 1 million." (*Flatley, supra*, 39 Cal.4th at p. 329.) The defendants also threatened to investigate the plaintiff's personal assets and to publicly "expose" all information, noting, " 'We are positive the media worldwide will enjoy what they find.' " (*Ibid.*) The Supreme Court determined the conduct "constituted criminal extortion as a matter of law in violation of Penal Code sections 518, 519 and 523," emphasizing that the "conclusion that [defendant's] communications constituted criminal extortion as a matter of law [were] based on the specific and extreme circumstances of [the] case." (*Id.* at p. 332, fn. 16.) "[O]ur opinion should not be read to imply that rude, aggressive, or even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion. [Citation.]" (*Ibid.*)

In *Paul for Council*, the pleadings submitted by defendants' in support of a motion to strike under section 425.16 showed that they "violate[d] the Political Reform Act [of 1974 (Gov. Code, § 81000 et seq.)] when they laundered campaign contributions to persons running for local and state offices." (*Paul for Council, supra*, 85 Cal.App.4th at p. 1361.)

As the Supreme Court did in *Flatley*, the Court of Appeal in *Paul for Council* made it clear that application of its holding relied heavily on the factual context of the case. “This case, as we have emphasized, involves a factual context in which defendants have effectively conceded the illegal nature of their election campaign finance activities for which they claim constitutional protection. Thus, there was no dispute on the point and we have concluded, as a matter of law, that such activities are *not* a valid exercise of constitutional rights as contemplated by section 425.16. However, had there been a factual dispute as to the legality of defendants’ actions, then we could not so easily have disposed of defendants’ motion.” (*Id.* at p. 1367.)

In the instant matter, Plaintiffs argue Bagheri’s statements were illegal as a matter of law, without citing any provision of the Penal Code or other legal authority to prove the illegality of the conduct, and without citing any portion of the record on appeal containing a concession by Bagheri to the illegality of his conduct. “[C]ase authorities after *Flatley* have found the *Flatley* rule applies only to criminal conduct, not to conduct that is illegal because in violation of statute [*sic*] or common law.” (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 806.) The essence of Plaintiffs’ lawsuit against Bagheri was a contract dispute; they alleged breach of contract, breach of covenant of good faith and fair dealing, fraud and intentional misrepresentation, unjust enrichment, slander and libel. These are all tort causes of action. While it is possible that Plaintiffs may allege that Bagheri did not intend to perform on the contract, it cannot be reasonably argued that the correspondence between the parties conclusively establishes that Bagheri engaged in fraudulent activity that was illegal as a matter of law, as there is a factual dispute regarding Bagheri’s intentions with respect to performance on the musical contract. Absent conclusive evidence or a concession from Bagheri, we therefore decline to dispose of the appeal before us on the basis that he was engaging in behavior that was illegal as a matter of law when he sent his communications to Plaintiffs.

C. Bagheri Did Not Meet His Burden of Proving that That the February 4 E-mail Was Sent in Connection With Proposed Litigation Contemplated in Good Faith and Under Serious Consideration

Bagheri focuses his appeal on his February 4 e-mail, arguing it was a prelitigation demand letter, and thus a writing in connection with civil litigation protected because it was a “made before . . . a judicial proceeding” as required by section 425.16, subdivision (e)(1), or “in connection with an issue under consideration or review by a . . . judicial body” under section 425.16, subdivision (e)(2). Bagheri additionally contends the trial court erred when it required that he demonstrate that the e-mail concerned proposed litigation contemplated in good faith and under serious consideration, arguing that by imposing this requirement, the trial court added an additional burden upon him not contemplated by the relevant anti-SLAPP law. We agree with the trial court that the protections of section 425.16, subdivision (e)(1) and (2) apply to a prelitigation statement only if the moving party demonstrates a good faith contemplation and serious consideration of proposed litigation, and that Bagheri did not meet this burden. In doing so, we disagree with Bagheri’s contention that the California Supreme Court’s ruling in *Flatley, supra*, 39 Cal.4th 299 necessitates a different result.

The requirement for a showing of good faith contemplation and serious consideration of proposed litigation has origins in cases interpreting Civil Code section 47, subdivision (b), the statute creating a privilege for publications or broadcasts made as part of a judicial proceeding, often referred to as the litigation privilege. (See *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241 (*Action Apartment*).) “To be protected by the litigation privilege, a communication must be ‘in furtherance of the objects of the litigation.’ [Citation.] This is ‘part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action.’ [Citation.] A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration. [Citations.]” (*Id.* at p. 1251.)

In *Flatley*, the California Supreme Court confirmed that, unlike the litigation privilege, the anti-SLAPP protections of section 425.16, subdivision (e)(1) and (2) do not protect all litigation-related speech, whether lawful or not. “. . . [T]he litigation privilege and the anti-SLAPP statute are substantively different statutes that serve quite different purposes, and it is not consistent with the language or the purpose of the anti-SLAPP statute to protect [unlawful threats of extortion].” (*Flatley*, *supra*, 39 Cal.4th at p. 322.) However, the Supreme Court did not say the litigation privilege requirements of Civil Code section 47, subdivision (b) have absolutely no bearing on a court’s analysis of the anti-SLAPP statute. “There is, of course, a relationship between the litigation privilege and the anti-SLAPP statute. Past decisions of this court and the Court of Appeal have looked to the litigation privilege as an aid in construing the scope of subdivision (e)(1) and (2) with respect to the first step of the two-step anti-SLAPP inquiry—that is, by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivisions [*sic*] (e)(1) and (2).” (*Id.* at pp. 322-323.) The Supreme Court did not explicitly address in *Flatley* whether the moving party in an anti-SLAPP motion must show that the litigation was contemplated in good faith or under serious consideration.

Subsequent to *Flatley*, courts have continued to require defendants seeking protection under section 425.16, subdivision (e)(1) and (2) to show the protected activity is related to litigation contemplated in good faith and under serious consideration. In *Neville v. Chudacoff*, the Court of Appeal reconfirmed the *Flatley* court’s finding that Civil Code section 47 “informs [a court’s] analysis” as to whether the subject activity might be protected under section 425.16, subdivision (e)(1) and (2). (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1263 (*Neville*).) The *Neville* court analogized the requirement under Civil Code section 47 that the statement must be “ ‘reasonably relevant’ to pending or *contemplated* litigation” to the requirement under section 425.16, subdivision (e)(2) that the statements at issue be “in connection with” an issue under

consideration by a judicial body. (*Id.* at p. 1266.) Relying in part on *Action Apartment, supra*, the Court of Appeal determined that a prelitigation statement can constitute protected petitioning activity under section 425.16 if it “ ‘concern[s] the subject of the dispute’ and is made ‘in anticipation of litigation “contemplated in good faith and under serious consideration,” ’ (*Rohde [v. Wolf]* (2007)) 154 Cal.App.4th [28] at p. 36, [*Rohde*], quoting *Action Apartment, supra*, 41 Cal.4th at p. 1251.)” (*Neville*, at pp. 1268, 1269; accord *People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 824 (*Anapol*); *Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 792 (*Bailey*) [“It is well settled that a party seeking to invoke the protections of section 425.16 for prelitigation statements must demonstrate that the statements ‘relate[] to litigation that is contemplated in good faith and under serious consideration.’ [Citation.]”].) “The ‘good faith [and under] serious consideration’ requirement is not a test for malice. [Citation.] Instead, it focuses on whether the litigation was genuinely contemplated. [Citation.] The requirement guarantees that hollow threats of litigation are not protected. [Citation.]” (*Anapol*, at p. 824.)

Thus, for Bagheri to show that the February 4 e-mail falls under the protection of section 425.16, subdivision (e)(1) or (2), he must show the e-mail related to litigation contemplated in good faith and under serious consideration.³ Having reviewed the pleadings, including supporting and opposing affidavits, we find Bagheri has not met this burden. In *Neville*, the appellate court found the party did meet this burden. “The evidence before the trial court . . . established a threat of impending litigation. The

³ In his reply brief, Bagheri argues “nothing in the record suggests that Bagheri’s prelitigation demand lacked seriousness or good faith.” This suggests a misunderstanding of the burden of persuasion on a motion to strike under the anti-SLAPP statute. The moving party has to show that the subject activity falls under the protection of the statute, and thus has to affirmatively show that the prelitigation communication related to a suit contemplated in good faith and under serious consideration. (*Bailey, supra*, 197 Cal.App.4th at p. 792.)

Letter's reference line reads, '*Maxsecurity v. Mark Neville, dba ABD Audio and Video.*' It is written on the letterhead of Chudacoff's law office, and states that 'this office represents Maxsecurity in the above-matter [*sic*].' The Letter further states, 'We have notified Mr. Neville of his breach and shall be aggressively pursue [*sic*] all available remedies.' Chudacoff declared that he 'undertook to represent Maxsecurity in its efforts to enforce the employment agreement' with Neville, and prepared the letter at his client's request. Maxsecurity filed suit approximately four months after the letter was written, with Chudacoff acting as counsel of record." (*Neville, supra*, 160 Cal.App.4th at p. 1269.) The court thus determined the letter was more than a threat " 'made merely as a means of obtaining settlement' " or in a situation where the defendants failed to establish " 'anything more than the mere *possibility*' of litigation." (*Id.* at pp. 1268-1269.)

We contrast the facts in *Neville* with those in *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1128, as modified (Mar. 23, 2006) (*A.F. Brown*), wherein the Court of Appeal determined defendants failed to show the prelitigation communication related to an anticipated lawsuit. The court determined the defendants' declarations showed their "good faith belief in a legally viable claim," but they failed to "demonstrate the acts were taken when litigation was under serious consideration. Indeed, the closest the declarations come to a discussion of contemplated litigation is the statement that Rhino informed Brown that if it failed to remit payment by a specified deadline, Rhino would issue the stop notices 'and pursue all available legal remedies.' This threat of potential legal action is insufficient, however, to demonstrate a lawsuit was under serious consideration." (*Id.* at p. 1128.)⁴

⁴ The Fourth District Court of Appeal decided *A.F. Brown* five months before the Supreme Court issued its decision in *Flatley*. In issuing its ruling, the Court of Appeal found section 425.16, subdivision (e)(1) and (2) to be "coextensive with the litigation privilege," suggesting that communications protected by the litigation privilege are necessarily entitled to the benefits of section 425.16. (*A.F. Brown, supra*, 137 Cal.App.4th at pp. 1125-1126.) While the Supreme Court confirmed in *Flatley* that not all privileged statements fall within the protection of the anti-SLAPP statute, the *A.F.*

Looking to these examples of what is and is not protected prelitigation activity under the anti-SLAPP statute, we consider the record before us. As of January 29, 2015, Bagheri indicated his intent to continue with the contract despite the parties' "deteriorating relationship," stating he "still looked forward to a successful performance." Ghiassi similarly suggested the parties proceed with the performance. However, by February 2, 2015, Ghiassi seemingly changed his mind, sending an e-mail stating he wanted to terminate the agreement mutually, with no financial damage to the parties. In response, Bagheri continued to state his willingness to proceed with the performance, requesting that Plaintiffs "honor their obligations" if they did decide to cancel. On February 2, 2015, Ghiassi confirmed he had not yet sent the payment due to Bagheri at the end of January 2015. In the February 4 e-mail, Bagheri stated his request that, because Ghiassi had not complied with the contract and made the payment, he must send the cancellation fee set forth in the contract; Bagheri stated if he did not receive the payment by a date certain, his "next contact with [Ghiassi would] only be through the court of law." In his motion to strike, Bagheri stated, "I wrote my February 4 email anticipating my dispute with [Plaintiffs] may end up in court," as Plaintiffs had tried to cancel the contract, failed to make the required deposit payment, and threatened litigation in the e-mails sent by Ghiassi. Yet, in response to Bagheri's February 4 e-mail, Jirabandei indicated Plaintiffs were willing to proceed with the performance if Bagheri apologized for his comments. Moreover, on February 8, 2015, Bagheri notified Plaintiffs he received the deposit money and intended to proceed with the performance.

While Bagheri made a brief mention of communicating with Plaintiffs "through the court of law," the language of his February 4 e-mail, stating his desire "to teach you

Brown court's discussion of whether the statements at issue demonstrated a lawsuit was under serious consideration can be used as an aid in considering whether the February 4 e-mail falls within the scope of section 425.16, subdivision (e)(1) and (2). (See *Flatley*, *supra*, 39 Cal.4th at pp. 322-323; *Neville*, *supra*, 160 Cal.App.4th at p. 1263.)

and people like you who are law breakers, dishonest and are total crooks a lesson,” and declaring he spends “more money for [his] dogs [sic] visits to the veterinarians than the money in question,” does not reveal a serious consideration of litigation at the time he sent the e-mail. As was true of the defendants in *A.F. Brown*, Bagheri may have had good faith belief that he had a potential legal claim against Plaintiffs. But, taken in context, the February 4 e-mail resembles a threat “made merely as a means of obtaining settlement,” or to compel performance by Plaintiffs, and Bagheri fails to establish “ ‘more than the mere *possibility*’ of future litigation.” (*Neville, supra*, 160 Cal.App.4th at pp. 1268-1269.) In contrast, the letter sent by an attorney on Bagheri’s behalf in early March 2015, contains the hallmarks of a quintessential prelitigation demand letter. The February 4 e-mail, however, does not fall within the ambit of section 425.16, subdivision (e)(1) or (2), as Bagheri has not shown it was sent in connection with proposed litigation contemplated in good faith and under serious consideration.

D. Bagheri’s Internet/ Social Media Posts Were Not in Connection With a Public Issue or Matter of Public Interest

On appeal, Bagheri suggests all of Plaintiffs’ causes of action are based solely on the February 4 e-mail. However, a review of the complaint and other pleadings in the record confirms Plaintiffs rely on other conduct, such as Bagheri’s alleged posts on social media or other Internet sites, to support their fifth and sixth causes of action for libel and slander.⁵ Notably, the trial court considered these Internet postings as well as the

⁵ Plaintiffs’ complaint includes allegations that Bagheri made derogatory statements during a telephone call Bagheri made to Jirbandei, which was overheard by several other people in her car, including Ghiassi, as well as Bagheri’s alleged derogatory statements to musicians and other members of the Iranian-American community, either orally, or by text or e-mail. Neither party discusses this alleged conduct on appeal, other than to reference the telephone call in their discussions of the factual background of the case. Bagheri does not argue before this court, and did not argue to the trial court, that any of this conduct falls within the protection of the anti-SLAPP statute. As such, this opinion will address only the conduct argued by the parties in their briefs, both those filed in the trial court and those filed on appeal. (See *G & W Warren’s, Inc. v. Dabney* (2017)

February 4 e-mail when denying Bagheri's motion to strike under the anti-SLAPP statute. We therefore also determine whether this online activity falls within the parameters of section 425.16, subdivision (e)(3), which protects "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest," or subdivision (e)(4), protecting, "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."⁶

Consistent with settled law, Plaintiffs concede Bagheri's Internet posts were made in a public forum. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1366 (*Wong*).) They dispute whether Bagheri's posts were connected with an issue of public interest, as required by section 425.16, subdivision (e)(3) and (e)(4).⁷ As part of his motion to strike, Bagheri contended negative comments made about businesses on public websites satisfy the "public interest" requirement as a "matter of law," citing *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138 (*Chaker*), and *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883 (*Wilbanks*). The trial court relied on *Rivero v. American Federation of State, County, and*

11 Cal.App.5th 565, 570, fn. 2; *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 451-452.)

⁶ Bagheri argues the issue of his alleged Internet posts is irrelevant, as Plaintiffs did not provide specific detail about the posts in their complaint. For purpose of review under the anti-SLAPP statute, we accept as true the evidence favorable to Plaintiffs. (*Blue, supra*, 23 Cal.App.5th at p. 150.) The anti-SLAPP process does not test the sufficiency of the complaint; that should be done through the demurrer or summary judgment processes. (See *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062 ["[a] motion to strike under section 425.16 is not a substitute for a motion for a demurrer or summary judgment"].) We consider only whether the facts as alleged by Plaintiffs fall within the ambit of the anti-SLAPP statute. Thus, we will assume for purposes of this appeal that there exist Internet posts as alleged by Plaintiffs.

⁷ Bagheri correctly argues that conduct qualifying for protection under section 425.16, subdivision (e)(1) and (2) does not have to otherwise be connected to an issue of public interest. (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478; *Rohde, supra*, 154 Cal.App.4th at p. 35.) Bagheri does not allege that any Internet posts he may have made would be protected as prelitigation communication.

Municipal Employees, AFL-CIO (2003) 105 Cal.App.4th 913, 919-921 (*Rivero*), and *Du Charme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107 (*Du Charme*), to find Bagheri did not demonstrate the postings involved a matter of public interest; Plaintiffs similarly address these decisions on appeal.

Rivero and *Du Charme* each set forth the criteria for a court to consider in evaluating whether activity concerns a public interest. In *Rivero*, the plaintiff was a janitorial supervisor at the University of California, Berkeley; while absent from work due to an industrial injury, he was accused of theft, extortion, and favoritism, resulting in suspension during an investigation. (*Rivero, supra*, 105 Cal.App.4th at p. 916.) The plaintiff's union distributed three documents discussing the allegations, resulting in the plaintiff filing a suit against the union. (*Id.* at pp. 916-917.) The Court of Appeal upheld the trial court order denying the union's motion to strike under the anti-SLAPP statute, finding the union had not met its burden of establishing that the suit concerned a matter of public interest. (*Id.* at pp. 924, 929-930.) In doing so, the appellate court distinguished the facts before it from previous cases in which the courts found a "public issue" or "issue of public interest": ". . . in each of [the previous cases], the subject statements either concerned a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations] or a topic of widespread, public interest [citation]. Here, the Union's statements concerned the supervision of a staff of eight custodians by Rivero, an individual who had previously received no public attention or media coverage. Moreover, the only individuals directly involved in and affected by the situation were Rivero and the eight custodians. Rivero's supervision of those eight individuals is hardly a matter of public interest." (*Id.* at p. 924.)

In *Du Charme*, a case issued shortly after the ruling in *Rivero*, the plaintiff sued a union alleging that he was wrongfully terminated from his employment with the union, and that the union posted a defamatory statement about his termination on its website.

(*Du Charme*, *supra*, 110 Cal.App.4th at p. 110.) The Court of Appeal upheld the trial court’s finding that the suit did not involve a matter of public interest. (*Id.* at p. 119.) “We . . . hold that in order to satisfy the public issue/issue of public interest requirement of section 425.16, subdivision (e)(3) and (4) of the anti-SLAPP statute, in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance. [Fn. omitted.] Because the allegedly defamatory statement in this case was not made in such a context, it is not entitled to the statute’s protection. We therefore need not determine what limitations there might be on the size and/or nature of a particular group, organization, or community, in order for it to come within the rule we enunciate today.” (*Id.* at p. 119.) The court distinguished the facts of *Du Charme* from other cases in which the activity might have been connected to an issue of interest “to only a limited but definable *portion* of the public, a *narrow* segment of society consisting of the members of a private group or organization,” yet it still qualified for protection under the anti-SLAPP statute because the allegedly defamatory statements were made not only in connection with an issue of interest to the members of the particular community, but also in the context of an ongoing controversy, debate or discussion within that community—a decision about future association governance in the former, an election of officers in the latter, such that protection of the statements at issue “serve[d] the anti-SLAPP statute’s purpose of encouraging *participation* in an ongoing controversy, debate or discussion. [Fn. omitted.]” (*Id.* at p. 118.)

After consideration of the standards enunciated in *Rivero* and *Du Charme*, we conclude Bagheri has not made a prima facie showing that Plaintiffs and/or Razi are in the public eye, that the conduct directly affected a large number of people, or that it

involved a topic of widespread public interest. Nor is there evidence the statements occurred in the context of an ongoing controversy, dispute or discussion about Plaintiffs' and or Razi's trustworthiness or standing in the community.

In his motion to strike, Bagheri argued the rulings in *Chaker* and *Wilbanks* control, as the statements in question allegedly involved postings on the Internet designed to keep people from using Plaintiffs' services. In *Chaker*, "a series of derogatory statements about [the defendant], and his forensics business, appeared on an Internet Web site where members of the public may comment on the reliability and honesty of various providers of goods and services and on another social networking Web site which provided an open forum for members of the public to comment on a variety of subjects." (*Chaker, supra*, 209 Cal.App.4th at p. 1142.) The Court of Appeal determined the statements were of public interest. "The statements posted to the Ripoff Report Web site about Chaker's character and business practices plainly fall within in the rubric of consumer information about Chaker's 'Counterforensics' business and were intended to serve as a warning to consumers about his trustworthiness. The remaining statements were posted to the 'topix' Web site, which identified itself as a social networking site . . . and permitted users to create their own profile and post information on its forum. These statements also fall within the broad parameters of public interest within the meaning of section 425.16. Of particular significance is the fact that it appears from the record Chaker became the subject of statements on the 'topix' Web site only after he posted a profile on the Web site and it generated responses from other members of the community, including apparently statements from [the defendant]. Having elected to join the topix Web site, Chaker clearly must have recognized that other participants in the Web site would have a legitimate interest in knowing about his character before engaging him on the Web site. Thus, here Chaker himself made his character a matter of public interest as the term has been interpreted." (*Id.* at pp. 1146-1147.)

While the court in *Chaker* appeared to have significant information about the nature of the websites at issue in the matter, and the substance of the comments posted on the websites, here the record includes limited information about the alleged posts. The complaint alleges, Bagheri “also posted several comments on social media websites repeating the same accusations and allegations against Plaintiffs”; the alleged accusations and allegations were that “no one should do business with Plaintiffs because they are ‘crooks,’ ‘law breakers,’ and ‘villains.’ ” There is no indication the social media websites were sites “where members of the public [could] comment on the reliability and honesty of various providers of goods and services” or that they “provided an open forum for members of the public to comment on a variety of subjects.” (*Chaker, supra*, 209 Cal.App.4th at p. 1142.) Nor is there indication that Plaintiffs posted profiles on the subject websites, thus “generat[ing] responses from other members of the community.” (*Id.* at p. 1146.)

We similarly distinguish this case from *Wilbanks*, wherein the defendant, a “ ‘consumer watchdog’ and an expert on issues surrounding viatical settlements,” established a website, on which she published negative statements about the plaintiffs, a viatical settlement broker⁸ and its president/ chief executive officer. (*Wilbanks, supra*, 121 Cal.App.4th at p. 889.) The Court of Appeal determined the defendant’s statements concerned a public interest, despite not meeting the criteria of *Rivero* and *Du Charme*. “[The defendant’s] comments on plaintiffs’ business practices do not meet these criteria, as plaintiffs are not in the public eye, their business practices do not affect a large number of people and their business practices are not, in and of themselves, a topic of widespread

⁸ “[V]iaticals are arrangements that allow dying persons with life insurance policies to sell their policies to investors for a percentage of the death benefits. . . . Viatical settlement firms provide the capital used to purchase the policies, typically receiving a fee of 20 to 30 percent of the amount of the death benefits. The policies are sold through independent sales agents, or brokers” (*Wilbanks, supra*, 121 Cal.App.4th at p. 889.)

public interest. Consumer information, however, at least when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest. . . . ‘Courts have recognized the importance of the public’s access to consumer information. “The growth of ‘consumerism’ in the United States is a matter of common knowledge. Members of the public have recognized their roles as consumers and through concerted activities, both private and public, have attempted to improve their . . . positions vis-à-vis the supplies [*sic*] and manufacturers of consumer goods. They clearly have an interest in matters which affect their roles as consumers, and peaceful activities, such as plaintiffs’, which inform them about such matters are protected by the First Amendment.” [Citation.]’ ” (*Id.* at pp. 898-899.) The appellate court found that “the viatical industry touches a large number of persons The information provided by [the defendant] on this topic, including the statements at issue here, was more than a report of some earlier conduct or proceeding; it was consumer protection information. [¶] . . . The statements made by [the defendant] were not simply a report of one broker’s business practices, of interest only to that broker and to those who had been affected by those practices. Wolk’s statements were a warning not to use plaintiffs’ services. In the context of information ostensibly provided to aid consumers choosing among brokers, the statements, therefore, were directly connected to an issue of public concern.^[9]” (*Id.* at pp. 899-900.)

⁹ “*Weinberg v. Feisel* [(2003)] 110 Cal.App.4th 1122, probably is the case most helpful to plaintiffs’ position. The parties in that case were aficionados of token collecting. The defendant believed that the plaintiff had stolen a token from him while at a token show, and began a campaign against the plaintiff that included letters to other collectors accusing plaintiff of the theft, and advertisements in a club newsletter describing the theft, although not naming the plaintiff as the thief. The court found that the defendant’s communications were published to a limited number of persons and concerned only a private dispute, and, therefore, were not connected to an issue in the public interest, even though they accused the plaintiff of criminal activity. (*Id.* at pp. 1132, 1134.) The court did not consider whether the publications might have been a kind of warning to consumers, alerting other token collectors to the perils of dealing with

Here, the record contains no information about the nature of the social media sites on which Bagheri allegedly posted his comments, unlike the clear indication in *Wilbanks* that the website at issue was devoted to providing consumer information about the specific industry involved in the case. While Bagheri, in his motion to strike, attempted to argue the comments were analogous to those at issue in *Wilbanks*, i.e., a “warning not to use plaintiffs’ services,” we cannot discern with any certainty whether that is truly the case, or whether the comments were more akin to those in *Weinberg v. Feisel*, i.e., aimed at a limited audience addressing a private dispute.

In *Wong*, this court confirmed that “ ‘not every Web site post involves a public issue [citation]’ ” (*Wong, supra*, 189 Cal.App.4th at p. 1366.) We found that “consumer information that goes beyond a particular interaction between the parties and implicates matters of public concern that can affect many people is generally deemed to involve an issue of public interest for purposes of the anti-SLAPP statute.” (*Ibid.*) In *Wong*, a father posted a review of his son’s dentist on Yelp, a consumer review website, stating he regretted taking the child to the dentist because she used nitrous oxide and a cheaper dental filling containing mercury. (*Id.* at p. 1361.) We agreed that the matter fell within the protections of the anti-SLAPP statute, as it concerned a matter of public interest. “[T]he posting went beyond parochial issues concerning a private dispute about particular dental appointments. It implicitly dealt with the more general issues of the use of nitrous oxide and silver amalgam, implied that those substances should not be used in treating children, and informed readers that other dentists do not use them. Thus, the review was not just a highly critical opinion of [the dentist’s] performance on particular occasions; it was also part of a public discussion and dissemination of information on

the defendant. In any event, the situation there is distinguishable from the situation here in that the defendant’s accusations were not part of a general broadcast, but were made only to a few collectors, and the defendant’s purpose appears to have been an attempt to exact a personal revenge on the plaintiff by causing him to be ostracized from the token collector community.”

issues of public interest.” (*Id.* at p. 1367.) But without knowing more about the substance of Bagheri’s alleged posts, and the audience to whom he posted the statements, we cannot find that Bagheri has met his burden to show that the posts concerned issues of public interest versus being aimed at a limited audience concerning a private dispute.¹⁰

Our conclusion comports with the California Supreme Court’s recent decision in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 (*FilmOn*).¹¹ Addressing subdivision (e)(4) of section 425.16, the Supreme Court determined that the context of a statement—including the identity of the speaker, the audience, and the purpose of the speech—informs the analysis of whether the speech qualifies for protection as being in connection with a public issue or issue of public interest. “What we hold is that the context of a defendant’s statement is relevant, though not dispositive, in analyzing whether the statement was made ‘in furtherance of’ free speech ‘in connection with’ a public issue. (§ 425.16, subd. (e)(4).) In an age of easy public access to previously private information through social media and other means, context allows us to assess the functional relationship between a statement and the issue of public interest on which it touches—deciding, in the process, whether it merits protection under a statute designed to ‘encourage continued participation in matters of public significance.’ (§ 425.16, subd. (a).)” (*Id.* at p. 140.)

In its assessment the Supreme Court noted, “The anti-SLAPP law was enacted ‘to protect nonprofit corporations and common citizens “from large corporate entities and trade associations” in petitioning government.’ [Citation.] Attempting to protect against

¹⁰ We recognize Bagheri is limited in this case by the information provided by Plaintiffs; he argues they did not state their claim with sufficient particularity. As we already stated, this is an issue to be raised not in a motion to strike under the anti-SLAPP statute, but a demurrer or summary judgment motion, if appropriate. (See fn. 6, *ante*.)

¹¹ The Supreme Court issued this decision after we took the instant matter under submission; we authorized the parties to provide supplemental briefing to address the application of the decision, which they did.

‘lawsuits brought primarily to chill’ the exercise of speech and petition rights, the Legislature embedded context into the statutory preamble, ‘declar[ing] that it is in the public interest to encourage continued participation in matters of public significance.’ (§ 425.16, subd. (a).)” (*FilmOn, supra*, 7 Cal.5th at p. 143.) Ultimately, the Supreme Court found the context of the case, involving “two well-funded for-profit entities engaged in a private dispute over ones’ characterization—in a confidential report—of the other’s business practices,” justified finding the defendant’s conduct was not “in furtherance of free speech ‘in connection with’ an issue of public interest. (§ 425.16, subd. (e)(4).)” (*Id.* at p. 154.) “Because our ‘primary goal is to determine and give effect to the underlying purpose of’ the anti-SLAPP statute [citation], this context matters. It allows courts to liberally extend the protection of the anti-SLAPP statute where doing so would ‘encourage continued participation in matters of public significance,’ but withhold that protection otherwise. (§ 425.16, subd. (a).)” (*Ibid.*) The parties’ disagreements may have taken place, in part, in a public forum, but it cannot be said that extending the protection of the anti-SLAPP statute to their contract dispute would encourage the participation of others in a matter of public significance. Here, the trial court properly withheld the protection of the anti-SLAPP statute by denying Bagheri’s special motion to strike as he did not meet his burden to show that the alleged posts were made in connection with a public issue or an issue of public interest.

III. DISPOSITION

The order dated July 16, 2015, denying Appellant’s special motion to strike under Code of Civil Procedure section 425.16, subdivision (a) is affirmed.

Greenwood, P.J.

WE CONCUR:

Elia, J.

Danner, J.

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No. H042939